EFFECT IN EQUITY OF A CONDITIONAL CONTRACT TO MORTGAGE.—In *Connecticut Co.* v. *New York, N. H. & H. R. R. Co.*,[1] a case recently before the Connecticut Court of Errors, corporation bonds contained a promise that in the event the corporation should thereafter mortgage any property owned by it at the date of the issue of the bonds, the bondholders should share equally in the security with the future mortgagees. The principal questions sent up by the lower court were: (1) whether the corporation could effect a valid mortgage in terms which would prevent the bondholders from sharing in the security; (2) whether the bonds created an equitable lien forthwith on the property owned by the corporation at the date of issue. The first question was answered unanimously in the negative; the second, two of the five judges dissenting, in the affirmative.

It is a well-established doctrine that a contract to mortgage property creates an equitable lien upon the property, provided the money has already been advanced.[2] Prior to the maturity of the loan damages are so conjectural that the lender would obviously be entitled to only a nominal recovery at law. The cause of action which arises if the debt is not paid at maturity is clearly an inadequate substitute for the security contracted for. Consequently such a promise will be specifically enforced.[3] Such an equitable lien like the equitable ownership of land in land contracts is considered a consequence of the right to specific performance.

If the contract be to mortgage property to be acquired in the future, the lien attaches upon the acquisition of the property.[4] In the principal case, however, the property is already acquired, but the promise to give security is conditional. Hence the inquiry becomes whether there is a lien before the condition is performed. The case of an option to purchase land provides an analogy. In such a case the promise of the landowner is, in substance, to convey the land if the option holder elects to exercise his option. No equitable estate in the land is created forthwith by the option contract, because until the option is exercised there is no vendor-purchaser relation.[5] Hence there is no right to specific performance, and consequently no equitable interest in the property is trans-

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[1] 107 Atl. 646. See RECENT CASES, p. 476, *infra*.

[2] Holroyd *v.* Marshall, 10 H. L. C. 191 (1862); Wickes *v.* Hynson, 95 Md. 511, 52 Atl. 747 (1902); Atlantic Trust Co. *v.* Holdsworth, 50 App. Div. (N. Y.) 623, 63 N. Y. Supp. 756 (1900); Carter *v.* Sapulpa & Interurban Ry., 49 Okla. 471, 153 Pac. 853 (1915); Fitzgerald *v.* Fitzgerald, 97 Kan. 408, 155 Pac. 791 (1916); *accord*. Chase *v.* Denny, 130 Mass. 566 (1880), *contra*. See Samuel Williston, "Transfers of Personal Property," 19 HARV. L. REV. 560, note 4. Also for definition of equitable lien, see 3 POMEROY, EQ. JUR., 4 ed., § 1235, cited with approval in Walker *v.* Brown, 165 U. S. 654, 664 (1897), and Knott *v.* Mfg. Co., 30 W. Va. 790, 795, 5 S. E. 266, 268 (1888).

[3] For collection of cases, see Ames, Cas. Eq. Jur. p. 61, note 3. And following more recent cases. King *v.* Williams, 66 Ark. 333, 50 S. W. 695 (1899); Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. 535 (1904). See also FRY, SPECIFIC PERFORMANCE, 3d ed., p. 23.

[4] Holroyd *v.* Marshall, *supra*.

[5] Stembridge *v.* Stembridge, 87 Ky. 91, 7 S. W. 611 (1888); Sweezy *v.* Jones, 65 Iowa, 272, 21 N. W. 603 (1884). Nor is there an equitable conversion until the option is exercised. Smith *v.* Loewenstein, 50 Ohio St. 346, 34 N. E. 159 (1893); Rockland Co. *v.* Leary, 203 N. Y. 469, 97 N. E. 43 (1911); *accord*. Lawes *v.* Bennet, 1 Cox Ch. 167 (1805), *contra*.

ferred. Again, certain illustrations of the doctrine of equitable conversion are helpful in this connection. If, in the case of a contract to convey land the vendor is unable to furnish good title, unless the contrary has been expressed there has been a breach of an implied condition precedent and the purchaser has an election whether he will compel a conveyance. It has been held under such circumstances, as where tested by the death of the vendor before the election, that there is no equitable conversion.[6] Furthermore the risk of loss, a natural concomitant of ownership, is, prior to the purchaser's election, to go after the property on the vendor.[7] Similarly it would seem in the Connecticut case that no property right was created by mere contract, and that none could arise until the corporation made a mortgage of some of its property. Until there were such a mortgage it would be impossible to say what property was subject to the lien. Just what or how much could not be determined until the future mortgage was made. Until the performance of this condition precedent, the specification by mortgage of the property, the bondholder is not entitled to specific performance. If the hypothesis that the creation of equitable property rights by contract is to be tested by the right to specific performance be correct, then it is immaterial whether the condition precedent is to be performed by the party claiming the equitable interest in the *res*, as in the option and defective title cases, or by the promisor, as in the principal case.

The judges who dissented on the second question seem to have reached the sounder view. The majority apparently gave the bonds a more sweeping effect than that of English debentures,[8] which are in the nature of floating mortgages not attaching to specific property until the happening of the event agreed on, *e. g.*, insolvency. To impose a cloud on the title of the corporation *ab initio* is a more serious matter and could hardly have been within the intent of the parties.[9] As to the first question there can be little doubt that when the mortgage is made, the condition is fulfilled, the property is ascertained, and the contract made specifically enforceable, so that from that instant the bondholders should share

[6] Thomas *v.* Howell, L. R. 34 Ch. D. 166 (1886); Lunsford *v.* Jarrett, 11 Lea (Tenn.), 192 (1883). See Cooper *v.* Jarman, 3 Eq. 98, 101 (1866).

[7] Mackey *v.* Bowles, 98 Ga. 730, 25 S. E. 834 (1896).

[8] For a good description of an English debenture see Government Stock Co. *v.* Manila Ry. Co., [1897] A. C. 81, 86 (1896); see also SIMONSON, DEBENTURES AND DEBENTURE STOCK, 15–26.

[9] If A contracts to mortgage his horse to B if it rains next Thursday, and B advance the money, before Thursday B will have no property right. But if A before Thursday gives his horse to C, or C purchases it with notice of the agreement, and Thursday is rainy, B should be able to compel a mortgage of the horse from C. Such is the result in the case of an option to buy land. A donee or purchaser with notice from the vendor must convey to the option holder if the latter exercises his option. Ross *v.* Parks, 93 Ala. 153, 8 So. 368 (1890); Calanchini *v.* Branstetter, 84 Cal. 249, 24 Pac. 149 (1890); Horgan *v.* Russell, 24 N. D. 490, 140 N. W. 99 (1913); Faraday Coal & Coke Co. *v.* Owens, 26 Ky. L. Rep. 243, 80 S. W. 1171 (1904); Sizer *v.* Clark, 116 Wis. 534, 93 N. W. 539 (1903); City of Birmingham *v.* Forney, 173 Ala. 1, 55 So. 618 (1911). No better reason can be assigned for this rule than that it is unconscionable for C thus to prevent performance of a bargain of which he has knowledge. Dean Ames suggested unjust enrichment. See "Specific Performance for and against Strangers to the Contract," 17 HARV. L. REV. 174. In the principal case, however, this situation can not arise, because, if the corporation sells any of its property, they cannot later mortgage it, and as to that property the contingency can never happen.

equally in the security.[10] Only where the mortgagees were purchasers for value of a legal interest without notice of the provision in the bonds should they come ahead of the bondholders.

TITLE TO SEASHORE AND SOIL UNDER NAVIGABLE RIVERS AND STREAMS. — By a rule of international law every independent nation is considered to have territorial property in and jurisdiction over the seas which wash its shores within a limit of three miles from low-water mark on the shore.[1] Moreover, title to the soil of all navigable tidal rivers as far inland as the tide ebbs and flows, and of all estuaries and arms of the sea, vests in the sovereign,[2] on the ground that such streams partake of the nature of the sea and are branches of it as far as it flows.[3] But inlets of the sea and small tidal creeks which are not susceptible of navigation belong to the owners of the lands along their banks.[4] In England, whatever may be the King's right to-day, it was early recognized that he had the right to make a grant of the soil under tidewaters.[5] The States are the successors to the rights of the English King in this country, and in the absence of any constitutional inhibition there is no reason why they cannot through their legislatures make similar grants.[6] In order to pass the soil under such waters, however, express words must be used.[7]

At common law, title to the seashore [8] on tidewaters was *prima facie* in the King. This was the opinion of Lord Hale [9] and the modern English cases have accepted his view.[10] The majority of American juris-

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[10] The right that the bondholders acquire when the contingency happens would seem to be the equitable ownership of the security title.

[1] Gann *v.* The Free Fishers of Whitstable, 11 H. L. Cas. 192 (1865); Manchester *v.* Mass., 139 U. S. 240 (1891).

[2] Gann *v.* The Free Fishers of Whitstable, *supra;* Townsend *v.* Brown, 24 N. J. L. 80 (1853); Hoboken *v.* Penn. R. R. Co., 124 U. S. 656 (1888).

[3] Royal Fishery of the Banne, Davies Rep. 149 (1610).

[4] See Commonwealth *v.* Charlestown, 1 Pick. (Mass.) 180 (1822); Rowe *et al. v.* Granite Bridge Corp., 21 *Idem.* 344 (1838).

[5] The Free Fishers of Whitstable *v.* Gann, 11 C. B. (N. S.) 387 (1861). The corporation of New York City received under royal charters title to lands under water along the East and North Rivers to the extent of four hundred feet from the line of low-water mark. Furman *v.* New York, 10 N. Y. 567 (1853).

[6] Gould *v.* The Hudson River R. Co., 6 N. Y. 522 (1852); Langdon *v.* New York, 93 N. Y. 129 (1883).

[7] Middletown *v.* Sage, 8 Conn. 221 (1830); Wright *v.* Seymour, 69 Cal. 122, 10 Pac. 323 (1886).

[8] The seashore is "that space of land on the border of the sea which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space of land between high and low water mark." 2 BOUVIER'S LAW DICT. 963. High and low water marks are the limits within which the tide ordinarily ebbs and flows. Atty.-Genl. *v.* Chambers, 4 De G., M. & G. 206 (1854); Church *v.* Meeker, 34 Conn. 421 (1867).

[9] "The shore . . . doth *prima facie* and of common right belong to the king." HALE, DE JURE MARIS, c. 4.

[10] Scratton *v.* Brown, 4 B. & C. 485 (1825); Le Strange *v.* Rowe, 4 Fost. & Fin. 1048 (1866); Pearce *v.* Bunting, L. R. 2 Q. B. D. 360 (1896). The King has the right to transfer title to the seashore by grant, subject to the public easements of navigation and fishing. Atty.-Genl. *v.* Parmeter, 10 Price, 378 (1822); Parker *v.* Elliott, 1 U. C. C. P. 470 (1851).